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ALEXANDER L. STEVAS,
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No. 82-267

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19__

D. J. McCARTHY, Superintendent,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

CONSTITUTIONAL PROVISIONS, STATUTES AND APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

ARTICLE I. In relevant part:

"Section 8.

". . ."

9. To constitute tribunals inferior to the Supreme Court; . . ."

ARTICLE III. In relevant part:

"Section 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a

compensation, which shall not be diminished during their continuances in office.

". . . ."

ARTICLES OF CONFEDERATION

"ARTICLE IX. In relevant part:

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; . . ."

STATUTES INVOLVED

Title 28 U.S.C."§ 636 In relevant part:

". . . .

"(b)(1) Notwithstanding any provision of law to the contrary-

"(A) A judge may designate a magistrate to hear and determine any

pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the

court of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject or modify, in whole or

in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

". . . ."

Title 28 U.S.C. "§ 2254 In relevant part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

" . . . . "

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of

competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or

over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided

for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous. . . . "

FEDERAL RULES OF CIVIL PROCEDURE

"Rule 53. In relevant part:

". . . ."

"(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

". . . ."

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN, Petitioner-Appellee, vs. D. J. McCARTHY, Superintendent, Respondent-Appellant	No. 81-5051 D.C. No. CV 77-3012 WMB OPINION

Appeal from the United States District Court for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding
Argued and Submitted October 7, 1981

BEFORE: WALLACE AND TANG, Circuit Judges, and TURRENTINE,*/ District Judge.

WALLACE, Circuit Judge:

McCarthy (the State) appeals from an order of the district court granting a

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*/ Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

writ of habeas corpus to Hinman pursuant to 28 U.S.D. § 2254. The State makes three different challenges to the granting of this collateral relief. First, the State contends that 28 U.S.C. § 636(b)(1)(B), which authorizes federal magistrates to conudct evidentiary hearings in habeas proceedings and make recommendations to the district court, constitutes an unconstitutional delegation under Article III and violates principles of comity and federalism. Second, the State argues that Hinman should be denied federal habeas relief as he has been afforded a full and fair opportunity to litigate his federal claim in state court. Last, the State contends that the district court erred in concluding that the improper admission of a statement elicited from Hinman by the police in violation of his Miranda rights, was not harmless beyond a reasonable doubt. We aff'rm.

I

A jury found Hinman guilty of murder in the first degree and of assault with a deadly weapon, in connection with the stabbing death of Hopkins on the morning of June 19, 1975. The events occurring prior to the stabbing are significant. We review the evidence in the light most favorable to the State. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

Hinman, age 18, and three young friends, Gutierrez, Harger, and Kicklighter, were walking to a hospital, in order to obtain medical treatment for injuries they had suffered in an earlier traffic accident. On the way, Gutierrez entered a parked automobile, apparently searching for something within the car, and then after exiting the vehicle, threw a brick through its window. The contents of the glove compartment were later found scattered on the floor of the automobile.

After the car window was broken, the four youths ran to the hospital. They were denied treatment because they were under age and were returning when the stabbing occurred.

Green had observed Gutierrez throwing the brick through the window of the automobile from his apartment and decided to find a public telephone and to call the police. While riding his bicycle in search of a telephone, Green encountered the four young men and asked them about the breaking of the car window. Green testified that after he mentioned that someone was going to call the police, Hinman pushed Green off his bicycle and the two began to fight in the street. Then, according to Green, Hinman asked Green if he wanted to get stabbed, and Green ran.

When Green reached his apartment house he saw Hopkins standing at the doorway. Hinman and the other three boys

caught up with Green, and Hinman was overheard making the statement "take it there." Green then entered the apartment house, whereupon he first realized that he had been stabbed. A few minutes later, Green went back outside and found Hopkins badly wounded, but was unaware of how the injury occurred.

Dooley, looking through her apartment window, saw the confrontation between Hopkins and the four young men. She saw Hopkins lying on the sidewalk fighting with one of them and heard one of the other young men say, "Turn him around. Come on. Turn him around. We will get him." She then observed one of them pick up an object that looked like a tent stake and turn toward Hopkins. At that point she backed away from the window.

At Hinman's trial, Kicklighter and Gutierrez each asserted his privilege against self-incrimination. A police

officer was permitted to read to the jury statements he had obtained from them shortly after the incident in question. As to the stabbing of Hopkins, Kicklighter told the police that while Hinman was fighting with Hopkins, Gutierrez took Hopkin's wallet out of his pocket. Kicklighter then stated, "As soon as Richard got the wallet, we ran across the street. When we got in Debbie's house, [Hinman] said he had stabbed the guy. [Gutierrez] pulled the guy's wallet out and started counting it. Everybody was supposed to get $5, but he went to the store." Gutierrez told the police that after Hopkins had been stabbed in front of the apartment house, he saw three $20 bills lying on the ground. He admitted taking the money and stated that later Hinman and Kicklighter wanted to "go halves" on the money, but he refused.

Hinman was apprehended by the police shortly after the homicide. When asked why he had run, Hinman stated "my two friends were going to rob this man . . . I didn't want to be associated in the robbery." The trial court admitted this statement despite the absence of proper warnings. The California Court of Appeals held that there was a violation of Miranda v. Arizona, 384 U.S. 436 (1966) (Miranda), but found the error to be harmless beyond a reasonable doubt.

After being denied a petition for hearing in the California Supreme Court, Hinman sought federal habeas corpus relief pursuant to 28 U.S.C. §2254. Hinman attacked his conviction, arguing, among other things, that the admission into evidence of his statement concerning the robbery violated his Miranda rights. The district court assigned the case to a magistrate who recommended that the

district court grant Hinman's relief. The district court agreed with the magistrate that admission into evidence of Hinman's statement, which was obtained without the warnings mandated by Miranda, was not harmless error beyond a reasonable doubt. Thus, the district court issued an alternative writ requiring Hinman's release or retrial.

II

The State argues that the grant of a writ of habeas corpus to a state prisoner based on findings of fact made by a United States Magistrate pursuant to 28 U.S.C. § 636(b)(1)(B), is an unconstitutional delegation of judicial power under Article III. Furthermore, the State contends that such a delegation is incompatible with principles of federalism and comity to the extent that it allows state court judgments on habeas corpus petitions to be set aside by officers who are not Article III

judges. We first consider the constitutional attack.

A.

In United States v. Saunders, 641 F.2d 659 (9th Cir. 1980), cert. denied, 101 S. Ct. 3055 (1981), we upheld the constitutionality of the Magistrate's Act with regard to the delegation of certain jury scheduling and instruction duties to an officer other than an Article III judge. See 28 U.S.C. §636(b)(3). We reach the same conclusion for the delegation in this case. While magistrates are not Article III judges, id. at 663, Congress had delegated certain judge-like functions to magistrates. Under the law, magistrates may conduct evidentiary hearings in habeas proceedings, as was done in this case. 28 U.S.C. § 636(b)(1)(B). The Supreme Court has recognized that Congress may establish "legislative courts" whose judges do not enjoy Article III protections, when

"necessary and proper" to resolve cases arising under the substantive powers conferred upon Congress by Article I. See, e.g., American Insurance Co. v. 356 Bales of Cotton (Canter), 26 U.S. (1 Pet.) 511 (1828) (territorial courts); Crowell v. Benson, 285 U.S. 22 (1932) (delegation of fact-finding to administrative officers in claims under the Longshoremen's and Harbor Worker's Compensation Act); Palmore v. United Staes, 411 U.S. 389 (1973) (local matters arising in the District of Columbia); Gosa v. Mayden, 413 U.S. 665 (1973) (Court of Military Appeals).

In Saunders, we observed that the Supreme Court has suggested that Congress's delegation power is not unlimited, Glidden Co. v. Zdanok, 370 U.S. 530, 549 (1962), and that "inherently judicial" tasks must be performed by Article III judges. United States v. Saunders, supra, 641 F.2d at 663. However we pointed out that the

Supreme Court has recently allowed magistrates to perform "inherently judicial" tasks when they do so under the supervision of an Article III judge. Id. In United States v. Raddatz, 447 U.S. 667 (1980), the Supreme Court faced a challenge to Congress's power to delegate certain fact-finding and recommendation functions with respect to a suppression motion in a criminal case. The Court stated that Congress was alert to Article III values when it vested such decision making power in magistrates and thus made it clear in enacting 28 U.S.C. § 636 that the ultimate decision rests with the district court. The Court stated:

> We need not decide whether, as suggested by the Government, Congress could constitutionally have deleged the task of rendering a final decision on the suppression motion to a non-Art. III officer. . . . Congress has not sought to make any such delegation. Rather, Congress has provided that the magistrate's proposed findings and

> recommendations shall be subjected to a de novo determination 'by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order.'

Id. at 681-82, quoting S. Rep. No. 625, 94th Cong., 2d Sess. 3 (1976). See also Mathews v. Weber, 423 U.S. 261, 271 (1976).

Although magistrate evidentiary hearings and subsequent recommended disposition of habeas corpus petitions might be considered "inherently judicial" tasks, under Raddatz delegation of those responsibilities cannot be considered unconstitutional as the district judge retains the power to make the final decision. The district judge could, at the request of the habeas corpus petitioner, or on his own motion, conduct his own evidentiary hearing if he deemed it necessary.[1] See Wingo v. Wedding, 418 U.S. 461, 486-87 (1974) (Burger, C.J., dissenting).

B.

The State also contends that magistrate habeas hearings involving state prisoners violate principles of comity and federalism. We conclude they do not. It is true that the Supreme Court has demonstrated a growing concern for comity and federalism considerations governing federal court intervention in state court adjudications. See Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971). The State's argument, however, does not challenge the right of the district court to pass on habeas corpus petitions of state prisoners. The attack is solely upon the use of magistrates to do so. But the State has failed to indicate how an evidentiary hearing held by a non-Article III officer causes any greater interference with a state's right to conduct its own criminal proceedings than an evidentiary hearing

held by an Article III judge. The position of the State, therefore, must go to a different level: that comity and federalism prohibit any interference with a state court judgment except by an Article III judge.

In Brown v. Allen, 344 U.S. 443, 500 (1953), the Supreme Court decided that federal habeas corpus relief must be available to permit state prisoners to relitigate the merits of constitutional questions already litigated at the state level, else a state court would have a final say on constitutional questions which Congress, by the Act of 1867, provided it should not have. However, granting jurisdiction to federal courts to examine alleged unconstitutional restraint of prisoners by the state created an area of potential conflict between state and federal courts. See Darr v. Burford, 339 U.S. 200, 204 (1950). Thus, Congress

enacted several provisions specifically designed to alleviate this tension. For instance, the federal habeas statute provides that a state petitioner must first exhaust his remedies in state court so that the state will have the first opportunity to correct constitutional defects whenever possible. 28 U.S.C. § 2254(b). Similarly, section 2254(d) provides that determinations of fact by a state court of competent jurisdiction and evidenced by a written finding or opinion shall be presumed to be correct, unless one of several specified conditions is found to exist or unless the habeas court concludes that the state court determination was not fairly supported by the record. 28 U.S.C. § 2254(d). See Sumner v. Mata, 449 U.S. 539, 547 (1981) ("This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of

all state courts.").

The State would have us hold that besides these safeguards already provided for by Congress, an additional safeguard, that of an independent judiciary, is demanded by the Constitution's federalism concerns. The State appears to be arguing that the recommendation-disposition procedure provided for in the Magistrate's Act, far exceeds the judicial prerogative relinquished by the states to the federal government upon the adoption of our constitutional plan. See Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 588 (1980). However, the State provides us with neither historical authority nor compelling argument to support this theory.

There is no doubt that the tenure and salary provisions of Article III were

intended by the framers of the Constitution to protect the proper allocation of power among the branches of the national government, as well as to provide a check on those branches should they attempt to encroach upon the states' domain. See id. at 582-83. Although we can envision circumstances in which the states have a significant interest in an impartial federal forum insulated from influence by the federal legislative or executive branches, the State has failed to show the presence of such circumstances in all stages of habeas proceedings involving state prisoners. Congress passed the Magistrate's Act to increase the overall efficiency of the federal judiciary without substantially increasing the number of federal judges. Congress recognized that, given the avalanche of additional work created for the district courts by new statutes and regulations, some sort of

innovative judicial assistance program was neecessary. Mathews v. Weber, supra, 423 U.S. at 267-68. There may be situations where the need for an independent federal judiciary in all stages of adjudication is so strong that such an efficiency goal must succumb to federalism concerns. Here, however, the State has failed to point out what additional risks are incurred when a non-Article III officer assists an Article III judge by holding evidentiary hearings and making recommendations to the district court. This is especially true in light of the fact that the district judge retains the power to reject or modify the magistrate's recommendation. 28 U.S.C. § 636(b)(C).

The State also argued that the overturning of state court judgments by Article I officers constitutes an affront to state autonomy and erodes the faith of the citizens of California in the authority

of its judicial process. That contention cannot be considered meritorious in light of the present statutory scheme under which the district judge retains the power to make the final decision on an application for writ of habeas corpus.

III

The State next contends that Hinman should not be permitted to utilize federal habeas to attack collaterally his conviction, as he has had a full and fair opportunity to litigate his Miranda claim in the state courts. The State relies primarily on the Supreme Court decision of Stone v. Powell, 428 U.S. 465 (1976), where the Court held that once a state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief because evidence obtained in an unconstitutional search or seizure was introduced at his trial. Id. at 494.

The Court reasoned that Fourth Amendment violations differ from violations of other constitutional rights because they do not tend to impugn the integrity of the fact-finding process or render evidence inherently unreliable. Rather, the exclusion of admittedly reliable and probative evidence from the criminal fact-finding process is justified on the grounds that it deters unconstitutional or otherwise unlawful police conduct. See id. at 484-90. However, the costs of the exclusionary rule are great, as it "deflects the truthfinding process and often frees the guilty." Id. at 490. The Court concluded that the additional deterrent effect, if any, that collateral review of search-and-seizure claims provides, is small in relation to these costs. Id. at 493. Furthermore, the Court suggested that habeas relief should be available primarily for the vindication of

constitutional rights that affect the determination of the accused's guilt or innocence, which is not the case in a typical Fourth Amendment claim. Id. at 491 n.31. See Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1086 (1977).

The State agrues that claims based on violations of Miranda should be similarly treated. The State would distinguish violations of the Fifth Amendment in the form of involuntary or coerced confessions resulting from threats, brutality or other types of coercion on the one hand, from the mere failure to provide an acceptable Miranda warning on the other. The latter, the State contends, does not interfere with the truthfinding process and is simply a judicially created prophylactic rule. As such, the State argues, the Stone rule should apply. See Brewer v. Williams, 430 U.S. 387, 423

(1977) (Burger, C.J., dissenting).

We do not believe, however, the question is open in this circuit. In a brief per curiam opinion, we have rejected this argument. Patterson v. Warden, 624 F.2d 69 (9th Cir. 1980).

IV

The California Court of Appeals held, and the State concedes, that Hinman's statement to the police that his two friends were going to rob Hopkins was made without the protections mandated by Miranda. Hinman argues that this statement was improperly admitted. The State challenges this assumption. Even granting that the police procured the statement in violation of Miranda, the State argues that it may still be admissible. Specifically, the State argues that if a defendant testifies in his own case, statements otherwise excluded under Miranda are admissible for impeachment. Because Hinman

testified that he had no intent to rob before he stabbed Hopkins, the State argues that no substantial harm occurred as the statement, which was offered during the State's case-in-chief, would have been admissible as part of the State's rebuttal evidence.

Hinman contends we need not reach the issue because, under California constitutional law, statements in violation of Miranda cannot be used in rebuttal. People v. Pettingill, 21 Cal.3d 231, 237 (1978). Hinman's argument fails. It is not the California Constitution which is our measuring rod in habeas corpus proceedings, but the federal Constitution. 28 U.S.C. § 2254(a).[2] Our task is to determine whether Hinman's federal constitutional rights have been violated.

This brings us to an analysis of Harris v. New York, 401 U.S. 222 (1971). There, the defendant testified in his own

defense and denied any intent to sell heroin to an undercover officer. He was then asked whether he made certain statements to the police. These statements were made in violation of Miranda. The trial judge instructed the jury that the statements attributed to the defendant could only be used in passing upon the credibility of the defendant and not as evidence of his guilt. The Supreme Court held this to be proper.

It is clear that the statements taken in violation of Miranda were not used in Harris to prove the defendant's guilt. The jury was appropriately instructed. Here, the statements were admitted as evidence of guilt. There was no proper instruction advising the jury of the limited use of the statement. See United States v. Basile, 569 F.2d 1053, 1060 n.3 (9th Cir. 1978) (Hufstedler, J., dissenting). Harris does not obviate the

problem. Therefore, we review this case on the basis that the statement was improperly admitted.

The State contends, however, that admission of the statement was harmless beyond a reasonable doubt as required to prevent reversal under Chapman v. California, 386 U.S. 18 (1967), because there is overwhelming evidence to support Hinman's conviction of felony-murder apart from this statement. Since the error committed in the state trial court was "a federal constitutional error," see United States v. Valle-Valdez, 554 F.2d 911, 915-16 (9th Cir. 1977), we are bound to reverse if "there is a reasonable possibility that the error materially affected the verdict." See id. at 915 (emphasis in original). In Chapman, the Supreme Court held that the "reasonable possiblity" test and "harmless beyond a reasonable doubt" test are essentially the

same. Chapman v. California, supra, 386 U.S. at 24.

The Court in Chapman found reversible error despite the fact that there was a reasonably strong "'circumstantial web of evidence'" against the defendants. Id. at 25. In a later decision, reaffirming the Chapman rule, the Court held the error harmless beyond a reasonable doubt as the case against the defendant was "overwhelming" and "not woven from circumstantial evidence." See Harrington v. California, 395 U.S. 250, 254 (1969). Thus, to decide whether admission of Hinman's statement constituted harmeless error under Chapman, we must evaluate the weight of the remaining evidence in support of his felony-murder conviction.[3]

The only basis for sutaining Hinman's first degree murder conviction is on a felony-murder theory. No question is raised as to whether Hinman committed the

homicide. The issue is whether a first degree murder conviction can be upheld. The California Court of Appeal specifically found that the case had been improperly submitted to the jury on a premeditation and deliberation theory of first degree murder since there was insufficient evidence in the record to support an inference of either. But under California Penal Code § 189, a murder committed during the perpetration of a robbery is murder in the first degree. The only theory of first degree felony-murder that was properly submitted to the jury related to the taking of Hopkins' property by Gutierrez.[4]

In order to sustain Hinman's felony-murder conviction based on the robbery of Hopkins by Gutierrez, the State was required not only to prove that Gutierrez had the specific intent to commit the concomitant felony prior to the time of the killing, People v. Sirignano, 42

Cal.App.3d 794, 801 (1974), but also to show that Hinman, as an aider and abettor of Gutierrez, had knowledge of Gutierrez's criminal purpose when he assisted him in the commission of the robbery. People v. Terry, 2 Cal.3d 362, 401 (1970), cert. denied, 406 U.S. 912 (1972). If Hinman is found to have aided and abetted Gutierrez in the robbery, and the homicide occurred after Gutierrez formed the specific intent to commit the robbery and during the perpetration of that robbery, then under California law, Hinman would be considered a principal and as such guilty of felony murder. Id.

The State correctly argues that under California law, the intent to commit the underlying felony may be proven by circumstantial evidence. People v. Sirignano, supra, 41 Cal.App.3d at 801. The State then points to three pieces of evidence in order to establish by

circumstantial evidence the prior intent to rob on the part of Gutierrez and the knowledge of that felonious intent by Hinman, the earlier rifling of the glove compartment, Kicklighter's account as to the taking of the wallet, and Gutierrez's contradictory and self-serving statement as to the same incident. We emphasize that we are not called upon to determine whether that circumstantial evidence alone is sufficient for a conviction. The issue is whether the State has demonstrated that this evidence is of such strength that we can say that the improperly admitted statement of Hinman did not, beyond a reasonable doubt, materially affect the verdict; or, alternatively phrased, whether the State has demonstrated that because of the strength of its case, there is no reasonable possibility that the error materially affected the verdict.

The State first points to Kicklighter's statement that while Hinman was fighting with Hopkins, Gutierrez took the wallet out of Hopkin's pocket, and as soon as he did, they all ran across the street, and that later there was to be a division of the money. The State contends that this account of the stabbing and the taking of the wallet clearly demonstrates that the group's primary objective was to steal the wallet. The State further contended at oral argument that Gutierrez's conflicting statement that he saw three $20 bills lying on the ground is so unbelievable and self-serving, that it lends further support to the inference that the group planned to rob Hopkins from the start.

Obviously, the fact that the group ran across the street as soon as Gutierrez got the wallet would lend the most support to this inference, since the statement that

Gutierrez took the wallet out of Hopkin's pocket while he was fighting with Hinman can just as easily support the inference that Gutierrez was acting independently and spontaneously as it would the inference that it was part of some common objective of the group. As to the running across the street, although it could be argued that such action implies that Hinman was aware of Gutierrez's plan to rob Hopkins, this action is somewhat ambiguous as Hinman may have run because he had just stabbed Hopkins. The fact that the group ran across the street immediately after the wallet was taken by Gutierrez would have greater significance if there had been no fight between Hopkins and Hinman and no stabbing. It is quite possible that the members of the group began running across the street at the same time, but for different reasons: Gutierrez because he had just stolen the wallet, Kicklighter

because he had witnessed this and Hinman because he had just stabbed Hopkins. Although Kicklighter's account of the incident strongly suggests that Gutierrez formed the intent to rob Hopkins prior to the stabbing as required under California law for felony-murder, neither the fact that they all ran across the street right after the wallet was taken nor that they later decided to divide the money, strongly suggests that the main objective of the group was to rob Hopkins. The first of these facts could just as easily have been conincidental, since as discussed above, Hinman probably had stabbed Hopkins near the time the wallet was taken. The fact that they later decided to divide the money could just as likely have been an afterthought by the group rather than the culmination of their original plan.

Another piece of evidence used by the State to support an inference of the

robbery intent is the rifling of the glove compartment that took place sometime before the boys encountered Hopkins. The State suggests that this incident, together with the stabbing of Green, are supportive of the position, accepted by the California Court of Appeal, that there was a general intent to steal on the part of the group prior to the killing.

However, no evidence that anything was taken from the car was ever introduced by the prosecution. Rather, the owner of the car testified that everything in the glove compartment had been taken out and scattered on the floor. Gutierrez told the police that the reason he threw the brick through the window was because he was mad and showing off. In light of these additional facts, there is an equally plausible inference that Gutierrez, or possibly the entire group, had the general intent to vandalize that morning, rather

than the intent to steal.

The State contends that the stabbing of Green further strengthens the inference that the group had the general intent to steal. But Green testified that the fight began when he mentioned that someone was calling the police. No attempt was made to take any of his property, such as his bicycle, and no demands for money or other property were made when he was surrounded by the group.

By comparison with the circumstantial evidence and possible inferences therefrom, the improperly admitted statement of Hinman goes right to the root of what the State must prove for a felony-murder conviction. While disassociating himself from the enterprise, he specifically states that the event in question was a robbery. Under these circumstances, it cannot be said that the State has proven beyond a reasonable doubt

that its case was so strong that the improper admission of Hinman's statement did not materially affect the verdict. Nor can it be said that there is no reasonable possibility that the error materially affected the verdict. The district judge found the State had not met its burden. We cannot say the district judge was wrong.

The writ in question is, of course, directed to that part of the state judgment dealing with first degree murder. The inadmissible statement had no effect upon Hinman's conviction of assault with a deadly weapon.

AFFIRMED.

FOOTNOTES

1. 28 U.S.C. § 636(b)(1)(C) states that:

> [T]he magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

2. 28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

3. The State contends that this examination would bring us into conflict with Sumner v. Mata, 449 U.S. 539, 547 (1981). There, the Court directed the federal court to identify its reasons when overturning a state finding of fact in a habeas corpus case. But here, no finding of fact is being attacked. The question is not whether the jury could have found that Hinman had the requisite felony-murder intent based upon the evidence presented to it. Rather our inquiry goes to the strength of the prosecution's case absent the tainted statement. Thus, no finding of fact by the state jury is being reviewed. For the same reasons, the State's contention that the district court should have applied the clearly erroneous test to the state jury's findings is rejected. That test

applies to factual review entirely different from that charged to the federal court in this instance. See, e.g., United States v. Flickinger, 573 F.2d 1349, 1356 (9th Cir.), cert. denied, 439 U.S. 836 (1978).

4. The actual instruction read, "If you find that Ricky Gutierrez did not form the intent to take property from Harry Hopkins until after the stabbing of said Harry Hopkins -- if Ricky Gutierrez did such act, then you are instructed that Harry Hopkins was not killed in the perpetration of, or an attempt to perpetrate, the crime of robbery, and as such it is not murder in the first degree under the felony murder rule."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN,	No. 81-5051
Petitioner-Appellee,	D.C. No. CV 77-3012 WMB
vs.	
D. J. McCARTHY, Superintendent,	AMENDMENT OF OPINION AND DENIAL OF REHEARING
Respondent-Appellant.	

BEFORE: WALLACE and TANG, Circuit Judges and TURRENTINE,*/ District Judge.

The Opinion filed in the above matter on February 16, 1982, is amended as follows:

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*/ Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

The sentence beginning "Thus, . . .," five lines from the bottom of the first column, slip op. 828, footnote 3, shall read: "Thus, no finding of fact by the state jury or finding accepted by the California Court of Appeal is being reviewed."

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc. Respondent.	)	No. CV 77-3012 WMB(S) JUDGMENT

The Court has this date signed and filed an order entitled "Order Conditionally Granting Petition for Writ of Habeas Corpus."

Pursuant thereto, the Court grants judgment in favor of the petitioner and against respondent.

IT IS ADJUDGED that a writ of habeas corpus shall issue discharging petitioner from custody and setting aside petitioner's conviction, which writ of habeas corpus shall be effective 120 days from the date this Judgment becomes final,

unless within said 120 day period the State of California shall institute proceedings for a new trial.

The Clerk shall transmit a copy of this Judgment, by United States mail, to petitioner, petitioner's counsel, the Attorney General of the State of California, and the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles.

Dated: December 30, 1980.

WILLIAM MATTHEW BYRNE, JR.
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc. Respondents.	No. CV 77-3012 WMB(S) ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C.A. § 636(b)(3) (West Supp. 1980), attached is the Report and Recommendation of the United States Magistrate who has reviewed the petition filed herein for issuance of a writ of habeas corpus.

The Court has reviewed the petition, the return, the records submitted therewith, the traverse, as the attached Report and Recommendation; it has further reveiwed the respondent's Objections to the Magistrate's Report and Recommendation and the petitioner's Response to Respondent's Objections.

The Supreme Court has now held that the delegation of power to magistrates to make proposed findings and recommendations, which shall be subjected to a de novo determination by the district judge, does not violate Article III of the Constitution. (See United States v. Raddatz, 100 S.Ct. 2406, 2415-16 (1980).) This district, therefore, did not violate the Constitution in delegating fact-finding and recommendation functions in habeas corpus proceedings, pursuant to the Federal Magistrates Act, 28 U.S.C.A. § 636(b)(1) (West Supp. 1980), because "the ultimate decision" is still made by this Court. (Raddatz, 100 S.Ct. at 2416.)

Respondent's challenge to the constitutionality of 28 U.S.C § 2254 (1976), which provides federal habeas corpus relief for persons in state custody, is without merit. It is well-settled that federal district courts have jurisdiction

to issue writs of habeas corpus after the prisoner in state custody has exhausted his state remedies. (See, e.g., Rose v. Mitchell, 99 S.Ct. 2993, 3003 (1979); Jackson v. Virginia, 99 S.Ct. 2781, 2790 (1979); Wainwright v. Sykes, 433 U.S. 72, 78-81, 97 S.Ct. 2497, 2502-03; Stone v. Powell, 428 U.S. 465, 494 n. 37, 96 S.Ct. 3037, 3052 n. 37 (1976); Preiser v. Rodriquez, 411 U.S. 475, 485-94, 93 S.Ct. 1827, 1834-39 (1973).) Because the petitioner has exhausted his state remedies, federal habeas relief is appropriate because the conviction was obtained in violation of his constitutional rights.

The Court concurs with the Magistrate's determination that there was insufficient evidence of specific intent to commit the offense of stealing, the felony that is requisite to support the conviction based on the felony-murder doctrine, absent

the petitioner's statement, which was obtained without the warnings mandated by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Because the only basis for sustaining the first-degree murder conviction was the felony-murder theory, and because there is insufficient constitutionally-obtained evidence of an underlying felony to support a conviction on that theory, the Magistrate was correct in concluding that the improper admission of the petitioner's statement was not harmless error within Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726 (1969).

Therefore, the Court concurs with and adopts the findings and conclusions of the United States Magistrate.

Accordingly,

IT IS ADJUDGED as follows:

1. That petitioner was convicted in violation of the Constitution of the Unted States.

2. That petitioner is entitled to a writ of habeas corpus from this Court.

IT IS ORDERED that a writ of habeas corpus will issue unless the respondent and the State of California shall, within 120 days from the date the Court's Judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order, the Judgment, and the Report and Recommendation of the United States Magistrate, by United States mail, on the petitioner, petitioner's counsel, the Attorney General of the State of California, and on the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles.

Dated: December 30, 1980.

Wm. Matthew Byrne, Jr.
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc. Respondent.	No. CV 77-3012 WMB(S) REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON PETITION FOR WRIT OF HABEAS CORPUS

This Report and Recommendation is submitted to the Honorable William Matthew Byrne, Jr., United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(3) and General Order No. 104 of the United States District Court for the Central District of California.

Statement of Proceeding

On December 4, 1975, following his conviction of violating Penal Code §§ 187

(first degree murder) and 245(a) (assault with a deadly weapon), petitioner was sentenced to state prison for the term prescribed by law. Petitioner appealed the judgment of conviction to the California Court of Appeal. On October 7, 1976 the Court of Appeal, in a two to one decision, affirmed the judgment. In essence, the majority reached the following conclusions:

1. That although petitioner's Miranda rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were violated, the error was harmless beyond a reasonable doubt (Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)(because "substantial evidence exists, apart from Hinman's remarks, to support a murder conviction on a felony-murder theory." (Appendix to Return, Slip Op. at p. 11.)

2. That the extra-judicial statements of Michael Kicklighter, one of three persons who were with petitioner at the time of the commission of the offenses of which petitioner was convicted were properly admitted into evidence as a declaration against Kicklighter's penal interest after the latter refused to testify at petitioner's trial following the assertion of his Fifth Amendment privilege. Additionally, assuming arguendo the extra-judicial statements of Richard Gutierrez (who was also with petitioner at the time of the commission of the offenses of which petitioner was convicted, and who also asserted his Fifth Amendment privilege at petitioner's trial), were erroneously admitted into evidence, "the error was harmless, since Gutierrez' s·atements covered

substantially the same matter as Kicklighter's statements." (Appendix to Return, Slip Op., p. 12.)

3. That although the trial court erred in submitting the case to the jury on a first degree murder theory of premeditation and deliberation, there being insufficient evidence to have justified such a submission, there was sufficient evidence introduced to have permitted the jury to find petitioner guilty of first degree murder on a felony-murder theory.

The dissent, on the other hand, stated that Kicklighter and Gutierrez' statements were improperly admitted as declarations against penal interest, and that the admission of these statements constituted a "clear violation of petitioner's federal constitutional witness-confrontation rights." (Appendix to Return, Slip Op., p. 29.) Further, the

dissent indicated that these errors, together with the conceded Miranda violations, cumulatively constituted "a clear case of reversible error." (Appendix to Return, Slip Op. at p. 31.) Moreover, the dissent could see no basis for concluding the errors were harmless beyond a reasonable doubt under Chapman.

Following the issuance of the decision of the Court of Appeal, petitioner filed a Petition for Hearing in the California Supreme Court. This petition was denied, as was a petition for writ of habeas corpus filed in that court. Parenthetically, it should be noted that although respondent originally argued that petitioner had failed to exhaust available state remedies, it is now conceded that the exhaustion requirement has been satisfied.

On August 11, 1977 petitioner filed his Petition for Writ of Habeas Corpus in this Co rt. In the petition

petitioner has attacked his conviction on the following grounds:

1. That his constitutional right to confront the witnesses against him was violated when the court permitted the extra-judicial statements of Kicklighter and Gutierrez to be introduced into evidence as declarations against their respective penal interests.

2. That the evidence was insufficient to sustain a conviction of first degree murder.

3. That the court erred in giving a felony-murder instruction to the jury.

4. That petitioner's extra-judicial statements were admitted into evidence in violation of the rules enunciated in Miranda v. Arizona, supra,

On September 6, 1977 respondent filed his Return to Order to Show Cause. On September 27, 1977 there was filed

Petitioner's Traverse to the Respondent's Return to the Order to the (sic) Show Cause.

On October 14, 1977, the Federal Public Defender applied to the Court to be appointed counsel for petitioner in this case. On October 18, 1977 the Magistrate granted this application. The Public Defender's application to file a supplemental traverse to the return was also granted. On December 5, 1977 the Public Defender filed a Traverse to Return to Order to Show Cause on petitioner's behalf.

On January 11, 1978 the cause came on for oral argument and now stands submitted.

Statement of Facts

On the morning of June 19, 1975 Glen Greene looked out of his window and saw four persons (who later turned out to be petitioner, Michael Kicklighter, Richard Gutierrez and Da' id Harger) walking down

Lomita Boulevard. One of these persons (who Greene did not believe was petitioner (RT 107-108) entered a Pinto automobile which was parked on the street and appeared to be looking for something. The person then exited the vehicle and threw a rock or brick through the window of it. The four persons then scattered (Rt 65-67.)

Greene subsequently left his apartment and had a conversation with petitioner on the street, during which he (Greene) made inquiry concerning the breaking of the car window. During this conversation petitioner asked Greene if he (Greene) wanted to get stabbed. They were less than an arm's length apart when this statement was made. Greene saw a knife in petitioner's hand at that time. Greene grabbed hold of petitioner's hair before petitioner touched Greene in any way. (RT 11.)

Greene then ran away, with

petitioner and the other three young men chasing him. As Greene neared the door of his apartment building he observed the decedent, Harry Hopkins, standing in the doorway. As Greene was being chased he heared footsteps, turned around and saw petitioner standing behind him with his arms outstretched, no further than an arm's length away. Petitioner was so close the witness could not see whether he (petitioner) had anything in his outstretched hand. Petitioner then made a statement to the effect "take it there." (RT 91-92.) Greene did not realize he had been stabbed until he entered the apartment building. (RT 93-94.)

Several minutes later Greene went back outside and saw the decedent had been wounded badly. Greene did not know how the decedent had been injured. (RT 103.)

Monica Greene, Glen Greene's wife, basically confirmed the testimony of her

husband. She testified additionally that when her husband came to the door of their apartment, he stated that a guy outside had a knife. She also observed her husband had been stabbed. Mrs. Greene also observed the wounds inflicted upon the decedent. (RT 121-124.)

Cecil Davidson, the owner of the Pinto referred to above testified that everything in the glove compartment had been taken out and scattered on the floor. A portion of a cinderblock was lying either in the car or near the curb. (RT 129-131.)

Maureen Dooley, looking through her apartment window, saw the confrontation between the decedent, on the one hand, and petitioner and his three companions, on the other hand. (RT 133-138.) Ms. Dooley testified that one of the four persons (who looked to be in his teens and who resembled petitioner) stated, "He's in there, isn't he? The person then stated, "Never mind.

It doesn't matter. Never mind." The person who was speaking was making no aggressive movements at the time. More conversation ensued, a lot of which Ms. Dooley could not hear. Shortly thereafter she saw the decedent down on the sidewalk, fighting with one of the boys who was wearing a dark shirt. As this boy was over the decedent, another boy said, "Turn him around. Come on. Turn him around. We will get him." At this time Ms. Dooley observed that the boy in the dark blue shirt had the decedent's arms behind him and was turning the decedent toward the other boys. She then observed one or two of the other boys pick up an object which reminded her of a tent stake. One of these boys then turned toward the decedent. Ms. Dooley stated that she believed it was the boy who picked up the item who stated "Turn him around. I will get him." (RT 148-161.) On cr ss- examination Ms. Dooley

stated that she was not sure which of the three remaining boys picked up the object and made the statement about turning the decedent arouns. (RT 165-166.)

Anna Hopkins, the decedent's mother, testified that when her son left home earlier in the evening he had approximately $200 in his wallet. She never saw the wallet again and it was never recovered. (RT 171-172.) Mrs. Hopkins also observed her son being pinned against a jeep on his knees, with a boy holding his (the decedent's) hands behind him. (RT 180.)

Charles Hopkins, the decedent's father, looked out of his apartment window and saw his son being accosted. He identified petitioner as the person who stabbed his son. Mr. Hopkins stated that he cculd see the stabbing motions being made. (RT 187-188.)

Eugene Trinkler, a Los Angeles

Police Department officer, apprehended petitioner in some shrubbery not far from the scene of the homicide. After apprehending petitioner, Officer Trinkler elicited a statement from petitioner which the Court of Appeal and respondent both concede was obtained in violation of petitioner's Miranda rights. The statement made by petitioner, and the legal analysis relating thereto, will be discussed in a subsequent portion of this Report and Recommendation.

Robert Williams, another police officer, overheard the statement made by petitioner to Officer Trinkler. Officer Williams conceded that the police report which was prepared in connection with this case does not contain any mention of a robbery. (RT 266-267.)

Diane Harger testified that on the morning of June 19 she was at Debbie Waller's apartment. Some time that morning

the witness' brother (David Harger), Kicklighter, Gutierrez and petitioner came to the apartment. They stated that David Harger had gotten into a fight with another man and that petitioner had stabbed this man in order to get him off of David. Ms. Harger saw a knife in petitioner's hand. Gutierrez and Kicklighter stated in petitioner's presence that petitioner was the one who did the stabbing, and petitioner did not deny this fact. In fact, he admitted the stabbing and looked scared and stuttered when he did so. Diane Harger also testified that her brother had stated that he was hit by this other man with some kind of stick which resembled a billy club. (RT 307-317.)

Debbie Waller testified that on the morning of June 19 Rick Gutierrez gave her a wallet which she put in her baby's room because there was money in the wallet. (RT 325-331.) Ms. Waller further

testified that the wallet, which belonged to Gutierrez, was turned over by her to a police officer the following day. (RT 346.)

James Kennedy testified that he was with the decedent in a bar on June 19. He saw a wallet in the decedent's possession at this time. As far as the witness knew, the decedent had the wallet in his possession when he left the bar and stated he was going home. (RT 333-335.)

Anna Hopkins and Monica Greene were recalled as witnesses. The essence of the testimony given by them was that no wallet containing money was found on the decedent's person, or among his property, following the stabbing incident. (RT 337-343.)

Raymond Gendreau, a police officer, testified that on June 19 he went to Debbie Waller's apartment and recovered from a dresser drawer located in a bedroom a wallet with $67 in it. There were three

twenty dollar bills and seven one dollar bills in the wallet. The wallet contained an identification with the name Jack Peters on it; however, Richard Gutierrez' picture was on the card. There were other documents in the wallet with Gutierrez' name on them. (RT 353-355.) Officer Gendreau also obtained statements from Michael Kicklighter and Richard Gutierrez. These statements were admitted into evidence over objection as declarations against the penal interests of the respective declarants. As indicated above, petitioner contends his constitutional right to confrontation was violated when the court admitted these statements into evidence. The statements, and the legal analysis relating thereto, will be set forth in a subsequent portion of this Report and Recommendation.

Theodore Light testified that on June 19 he showed a number of photograohs

to the decedent's father. The latter, without hesitation, identified petitioner as the one responsible for the assault on his son. (RT 379-381.)

Doris Hinman, petitioner's mother, testified that she had purchased a buck knife for petitioner prior to June 19 and had not seen the knife since that date. (RT 403-404.)

Defense

Petitioner testified in his own behalf. He stated it was Rick Gutierrez who had broke into the car and he did not know Rick was going to break the car window before it happened. Petitioner also testified that Greene hit petitioner first, at which time petitioner fell to the ground and Greene tried to hit him again. Petitioner denied saying to Greene "Do you wnat to get stabbed?" Petitioner testified that subsequently the decedent jumped off the steps and hi: David Harger in the

mouth. The decedent was on top of David. Petitioner tried to push the decedent off of David, but the former would not move. Petitioner then stood up and was trying to get the decedent off again. He then knifed the decedent. He stabbed him once but does not know where.

Petitioner saw a wallet but does not know if it belonged to the decedent or Gutierrez. He did not take anything from the decedent. He did not know Gutierrez was going to take anything from the decedent, and did not know Gutierrez had taken anything from the decedent until they returned to the apartment and Gutierrez pulled out a wallet and looked inside. Petitioner stated he had no intention of robbing the decedent, or of taking anything from him. Neither petitioner nor Gutierrez nor any of the other boys talked about robbing the decedent.

Petitioner admitted running and

trying to get away from the police after the stabbing incident occurred. Petitioner stated he realized he had stabbed someone. Petitioner also admitted stabbing Glen Greene. Petitioner said he stabbed Greene when the latter was on top of him (petitioner). He stabbed Greene in order to get Greene off of him (petitioner). Petitioner did not see Gutierrez stab the decedent or take his wallet and denied telling Sergeant Trinkler that he did see this happen. (RT 431-456.) Petitioner denied he wanted to split any money with Gutierrez and that he and Kicklighter each wanted fifty per cent of the money Gutierrez had obtained from the decedent. He denied making the statement testified to by Ms. Dooley, namely, "Turn him around, I will get him." (RT 466-469.)

Charles Hart, another police officer, talked to David Harger on June 19 and took a statement from him. Harger's

father was present at this time. The officer was then permitted to read the statement of Harger to the jury, in light of the fact the latter had previously asserted his privilege against self-incrimination.

Dr. Breton, a deputy coroner, testified that the decedent had a stab wound in the right side of the chest and stab wounds in the right side of the small of the back. The stab wound in the abdomen was caused by a sharp, narrow instrument, single edged, similar to a knife. (RT 27-32.)

Discussion

Petitioner's first claim is that his constitutional right to confront the witnesses against him was violated when the court permitted the extra-judicial statements of Kicklighter and Gutierrez to be introduced into evidence as declarations against their respective penal interests.

Thus, after Kicklighter and Gutierrez each asserted his privilege against self-incrimination, Officer Gendreau was permitted to read to the jury the statements he had obtained from them shortly after the incident in question. These statements are as follows:

Kicklighter's Statement

"About 1:30 p.m. I was out with Richard Gutierrez, Russell Hinman and David Harger. They were in a traffic accident earlier. It was my truck they rolled. We went to where the truck was. Then we left and went to Debbie's house. Then the four of us started for Bay Harbor Hospital. Richard got in the car and broke the window. Then we ran to the hospital. They told Richard they wouldn't help him in the hospital. Then we left the hospi al. We were at Lomita

and President when we say a guy chasing Russell. Russell said that was the owner of the car. David started to punch this guy. So did Richard. I stood on the side and didn't do anything. Then they chased him down Lomita to his house. He ran in the house. There was another guy in front of the house. All four of us talked to him. He asked us why we were chasing the guy who lived in that house. Then he punched David. They fought and hit a Jeep, and they fell to the ground. People were hollering out the window of a house there. While he was fighting with David, Richard took the wallet out of the guy's pocket. As soon as Richard got the wallet, we ran across the street. When we got in Debbie's

house, Russell said he had stabbed the guy. Richard pulled the guy's wallet out and started counting it. Everybody was supposed to get $5, but he went to the store. The police showed up later. I hid behind Lucky's. I went home at 4 a.m. in the morning. I am on probation for tampering." (RT 363-364.)

Gutierrez' Statement

"This morning about 1 a.m. I was in Kicklighter's truck with Russell Hinman; Mike Worth, 16, who lives at 266th and President; David Harger; and Tony Tota, 19, who lives at 253rd and President. At 213th and Normandie we had a traffic accident. A traffic report was made. After that we went to Russell's house. Then we went to Bay Harbor Hospital --

Kicklighter, Harger and Hinman. The hospital wouldn't treat me, because I wasn't of age. When we left, Russell got into a fight with a guy and called us. We went back, and then he ran away from Russell. He ran into an apartment. There was another guy standing by a Jeep. Then David talked to him about the fight. Then he and that guy got in a fight. They were both on the ground, and that guy had David Harger by the hair. Then the guy screamed. Russell was standing there. So was Kicklighter. Then we went to Russell's house. As we walked to the house, Russell Hinman said something like, 'I stabbed the guy.' Mike Kicklighter, 16, lives at 254th and President. After the guy got

stabbed in front of the apartment, I saw three $20 bills lying on the ground. I put the money in the baby's room in Debbie's apartment, in a chest of drawers. It's my wallet. All the money in that wallet is what I picked up. Russell Hinman and Mike Kicklighter wanted to go halves on the money, but I said no. Russell Hinman said his mother bought the knife for him last week. It is a buck knife. It's a folding type knife that locks in place, with a 5-inch blade.

". . . .

"There is one other thing I want to tell you. Before we went to the hospital, I was walking down Lomita Boulevard about one-half block west of the hospital with the othe· three guys. I threw a

brick through a Pinto window, because I was mad. I was showing off." (RT 365-367.)

The statements of both Kicklighter and Gutierrez were, of course, hearsay. As indicated above, the Court of Appeal concluded that Kicklighter's statement was properly admitted as a declaration against his penal interest. The court did not expressly decide whether Gutierrez' statement was properly admitted. Rather, the court stated that even if his statement had been improperly admitted, the error was harmless since Gutierrez' statement "covered substantially the same matter as Kicklighter's statements." (Appendix to Return, Slip Op., p. 12.)

The Magistrate believes it is unnecessary, and perhaps impermissible, for the Court to determine whether Kicklighter and Gutierrez' statements were properly admitted under the state law as

declarations against their respective penal interest.[1/] Thus, even if the statements were improperly admitted, it does not follow a federal constitutional violation occurred. As the plurality decision in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed 2d 213 (1970), quoting from California v. Green, 399 U.S.

1/ The Magistrate believes it is impermissible for this Court to determine whether the state courts have properly determined Kicklighter and Gutierrez' statements were properly admitted as declarations against interest because the interpretation of the state's evidentiary rule relating to such declarations (Evidence Code § 1230) would seem to present a matter of state law only. It is well established that state court evidentiary rulings are not cognizable in federal habeas corpus proceedings. (Sigurdson v. Landon, 215 F.2d 791 (9th Cir. 1954); LaBrasca v. Misterly, 423 F.2d 708 (9th Cir. 1970).

149, 90 S.Ct. 1930, 26 L.Ed 2d 489 (1970), noted:

> ". . . Merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."

It is clear, therefore, that not every hearsay violation mandates a finding that the Confrontation Clause has been violated. This fact was also noted by the court in Green, supra, when it stated:

> ". . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a

codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence. . . ." (399 U.S. at p. 155.)

The lack of congruence between the hearsay rule and the Confrontation Clause was recently recognized in United States v. Eaglin, No. 75-2720)9th Cir. August 10, 1977). In Eaglin the Court, in interpreting the plurality decision in Dutton, supra, stated that a four-pronged test must be employed in determining whether a constitutional violation has occurred when the extra-judicial statement of a declarant is admitted into evidence and the defendant was not afforded the opportunity to cross-examine the declarant due to his unavailability as a

witness.[2/] The test, the application of which is designed to determine whether the trier of fact was afforded a satisfactory basis for evaluating the truth of the extra-judicial declaration, is as follows:

"1. The declaration must contain no express assertion of a past fact.

"2 The declarant must have personal knowledge of the identity and role of the participants in the crime.

"3. The possibility that the declarant was relying upon faulty recollection must be remote.

[2/] The fact that Kicklighter and Gutierrez each asserted his privilege against self-incrimination made them unavailable as witnesses. Evidence Code §240; Rule 804(a), Federal Rules of Evidence.

"4. The circumstances under which the statements were made must provide reason to believe that the declarant did not misrepresent the defendant's involvement in the crime."

See also U.S. v. Di Rodio, No. 77-2448 (9th Cir., November 30, 1977).

In the present case, therefor, the test set forth above must be applied to Kicklighter and Gutierrez' statements in order to determine whether a Confrontation Clause violation resulted from their being admitted into evidence.

Taking Kicklighter's statement first, it is clear element No. 1 of the Dutton-Eaglin test was not satisfied since the statement clearly contained express assertions of past fact. Eaglin teaches, however, that a failure to satisfy this element does not automatically give rise to a Confrontation Clause violation. Indeed, the court in Eaglin, citing U.S. v. Snow,

521 F.2d 730 (9th Cir. 1975), cert. denied 423 U.S. 1090, 96 S.Ct. 883, 47 L.Ed.2d 101 (1976), stated that if only the second and third prongs of the test are satisfied, it can be held there is no violation of the right to confrontation.

Kicklighter's statement patently satisfies elements 2 and of the Dutton-Eaglin test, since Kicklighter clearly had personal knowledge of the participants' identities and there clearly was a remote possibility of faulty recollection. In this latter connection it is noted Kicklighter's statement was made to Officer Gendreau on the very day the events in question occurred. Even element 4 seems to be present in this case, i.e., there is no indication Kicklighter misrepresented petitioner's participation in the crime. With respect to this latter point, two comments are worthy of mention. First, the statement given by Kicklighter

closely paralleled petitioner's trial testimomy, and it is clear no effort was made by Kicklighter to lay the blame on petitioner. Second, Kicklighter's statement was also signed by his father, who was apparently present when the statement was given. (RT 359-362.) This additional fact serves to enhance the integrity of the statement that was given by Kicklighter.

Except for the fact Gutierrez' father was apparently not present when the former made his statement to Officer Gendreau, the application of the Dutton-Eaglin test is subject to the same analysis, and yields the identical result, as in the case of Kicklighter. It must be concluded, therefore, that the admission of neither Kicklighter nor Gutierrez' statements violated petitioner's constitutional right to confrontation. In light of the fact no Confrontation Clause

violation has been found, it is unnecessary to engage in constitutional harmlessness analysis. (U.S. v. Eaglin, supra, at p. 1809.)

Petitioner's next claim is that statements made by him to Officer Trinkler violated the mandate of Miranda v. Arizona, supra. The facts giving rise to this claim may be briefly summarized as follows:

After Officer Trinkler apprehended petitioner in some shrubbery shortly after the homicide was committed, and while he was escorting petitioner to the sidewalk, the following conversation, which was admitted over a Miranda, objection, took place between Trinkler and petitioner.

> All I said to him was, 'Why did you run?' He said, 'My two friends were going to rob this man' that he said he thought got out of a pickup truck. 'I didn't want to be associated in the

robbery.' Then I asked him who were the friends, what were the names of the friends that were involved in the robbery, and who cut the victim. He said that Ricky Gutierrez was the suspect that cut the victim and the other was Mike Kicklighter and he was the one that held the victim. At that time I observed that he had two fairly large blood stains on the front of his T-shirt and they were glistening, fresh, wet blood stain. I noted that when I got him out into the street light these blood stains existed on his clothing, and I asked him where he was. He said that he was in the middle of the street, watching from that point and that this was happening on the sidewalk, on the south sidewalk. At that point, I

determined that he was obviously --- there was a discrepancy in his story, being that the blood was fresh on his clothing. That's all I asked him." (RT 238-239.)

It has already been noted above that the Court of Appeal found, and respondent herein concedes, that the statement made by petitioner was admitted in violation of Miranda's mandate. The only question presented, therefore, is whether the admission of the statement was harmless beyond a reasonable doubt under the Chapman test.

It will be remembered that the Court of Appeal specifically found that this case had been improperly submitted to the jury on a premeditation and deliberation theory of first degree murder since there was insufficient evidence in the record to support an inference of premeditation or deliberation. It

necessarily follows, therefore, that the only basis for sustaining a first degree murder conviction was on a felony-murder theory. As has also been noted, the Court of Appeal found sufficient evidence in the record to support a first degree murder conviction based on that theory.

In California a murder committed in the perpetration of a robbery is murder in the first degree. (Penal Code §189.) In the present case it is clear, based upon the instructions given by the court (CT 66; 88; 89), that the only theory of first degree felony-murder which was submitted to the jury related to the taking of the decedent's property by Richard Gutierrez. Thus, the court specifically instructed:

> "If you find that Ricky Gutierrez did not form the intent to take property from Harry Hopkins until after the stabbing of the said Harry Hopkins -- if Ricky

Gutierrez did such act, then you are instructed that Harry Hopkins was not killed in the perpetration of, or an attempt to perpetrate, the crime of robbery, and as such it is not murder in the first degree under the felony murder rule." (CT 89.)

It is clear from the foregoing, therefore, that the point in time that Gutierrez formed the intent to rob the decedent was crucial to petitioner's conviction of first degree felony-murder. The only evidence which was introduced at petitioner's trial which directly related to Gutierrez' intent at the time he took the decedent's money was Kicklighter and Gutierrez' statements to Officer Gendreau, Kicklighter's preliminary hearing testimony

and petitioner's non-Mirandized statements to Officer Trinkler.3/

3/ It should be noted that the Court of Appeal stated that the "jury in the case at bar could have inferred a prior intent to rob Harry Hopkins from the fact that one of the individuals in Harry Hopkins' (sic) group had broken into a car previously, and the contents of the glove compartment were thrown out. This was sufficient to infer a general intent to steal on the part of the group prior to the killing." (Appendix to Return, Slip Op. p. 16.) Frankly, the Magistrate is not quite sure what the court meant by the term "a general intent to steal." In any event, assuming there is such a thing as a general intent to steal," the Magistrate does not see how such an intent can be translated into the specific intent required in California for the crime of robbery (CT 88), especially since the car incident occurred a number of minutes before the stabbing incident. Indeed, the record reflects that after the rock throwing incident petitioner and his companions went to a hospital to seek medical treatment. It was only after they left the hospital that the confrontation with Glen Greene, and then the decedent, occurred. To reiterate, the Magistrate believes that it stretches legal analysis to the breaking point to conclude that the fact a member of petitioner's group broke into an automobile some time earlier constituted evidence that Gutierrez intended to rob the decedent prior to the time the stabbing occurred.

In his statement Kicklighter stated that while David Harger and the decedent were fighting, Gutierrez took a wallet out of the decedent's pocket. Kicklighter further stated that after he and his friends, including petitioner, returned to Debbie Waller's apartment "Richard pulled the guy's wallet out and started counting it. Everybody was supposed to get $5, but he went to the store . . . ." (RT 364.) The only statement made by Kicklighter which would support an inference that the intent to rob the decedent arose prior to the stabbing was "Everybody was supposed to get $5." The Magistrate believes, however, that this statement is at best ambiguous and could have just as easily been interpreted to mean that when Gutierrez displayed the money, petitioner and Kicklighter each asked to receive $5.00. In any event, it is clear Kicklighter's statement contains

no express assertion that he, petitioner and Gutierrez intended to rob the decedent prior to the time petitioner stabbed him.

It should also be noted that Kicklighter's preliminary hearing testimony was read to the jury in this case. In this tetimony Kicklighter stated that during the fight involving the decedent and David Harger, and while petitioner was on the ground, "Rick got the wallet." (Preliminary Hearing Transcript, p. 43.) On cross-examination Kicklighter denied that Gutierrez had said anything to the effect of "Let's take a wallet." Rather, Kicklighter specifically testified that Gutierrez took the wallet on his own. (Preliminary Hearing Transcript, p. 55.) This testimony certainly does not lend support to the theory that the intent to rob arose prior to the stabbing.

Gutierrez' statement is even less supportive of a felony-murder theory.

Thus, he stated that "After the guy got stabbed in front of the apartment, I saw three $20 bills lying on the ground. I put the money in the baby's room in Debbie's apartment, in a chest of drawer. It's my wallet. All the money in that wallet is what I picked up. Russell Hinman and Mike Kicklighter wanted to go halves on the money, but I said no." (RT 366-367.)

It would seem that the most reasonable interpretation of Gutierrez' statement is that he did not decide to take the decedent's money until he saw it lying on the ground after the decedent was stabbed. Obviously, if this state of facts was believed, the jury could not have found petitioner guilty of first degree murder on a felony-murder theory.

It is with the foregoing in mind that the admission of petitioner's extra-judicial non-Mirandized statement must be examined. Thus, in this statement

petitioner, much more clearly than either of his companions, indicated that his two friends were going to rob the decedent and that he (petitioner) did not want to become involved. Although petitioner's statement in this regard appears to be exculpatory on its face, it must be noted that exculpatory statements are included within the Miranda rule. (Miranda v. Arizona, supra, 384 U.S. at p. 444.) More importantly, the jury was not required to believe petitioner's assertion that he did not wish to become involved in the robbery his two friends were going to commit. To the contrary, the jury could well have believed that Kicklighter, Gutierrez and petitioner intended to rob the decedent, petitioner's statement to the contrary notwithstanding.

It appears to the Magistrate, therefore, that the most clear indication that an intent to rob the decedent existed before the stabbing came from petitioner's

own non-Mirandized statement. Under such circumstances, the Magistrate is unable to state that the admission of this statement was harmless beyond a reasonable doubt. In this connection, as is pointed out by petitioner in his traverse, it can hardly be claimed the admission of petitioner's statement constituted harmless error since respondent himself has sought to utilize the statement in an effort to buttress a felony-murder theory of first degree murder. (Respondent's Return, p. 35.)

Based on the foregoing, the Magistrate has concluded petitioner is entitled to a writ of habeas corpus from this Court. In reaching this conclusion the Magistrate notes that petitioner has presented two other issues to the Court, namely, that the evidence was insufficient to sustain a conviction of first degree murder and that the court erred in giving a feloney-murder instruction to the jury. In

light of the fact a new trial will be necessary in this case in the event the Court adopts the Magistrate's recommendation herein, the Magistrate believes it would be inappropriate for the Court to make a determination as to these issues at this time since, on retrial, new evidence may be presented with respect to the felony-murder theory. The Magistrate would be remiss if he did not state, however, that if no new evidence is introduced on retrial with respect to such theory, the state should carefully consider the wisdom of requesting felony-murder instructions.

Based on the foregoing, IT IS RECOMMENDED that an Order be issued by the Court granting the petition for writ of habeas corpus.

Dated: January 30, 1978.

HARVEY A. SCHNEIDER
United States Magistrate

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner-Appellee v. D. J. McCARTHY, Superintendent, Respondent-Appellant.	No. 81-5051 D.C. No. CV 77-3012 WMB O R D E R

Appellant's Motion for Recall of the Mandate and for Stay of Mandate Pending Application to the United States Supreme Court for a Writ of Certiorari is denied.

United States Circuit Judge
J. CLIFFORD WALLACE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN,	)	
	)	
Petitioner-Appellee,	)	
	)	No. 78-3005
vs.	)	
	)	ORDER FOR
D. J. McCARTHY,	)	REMAND
Superintendent,	)	
	)	
Respondent-Appellant.	)	
	)	

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and HUG, Circuit Judges, and INGRAM,*/ District Judge.

California appeals from the district court's judgment granting Hinman a

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*/ The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

writ of habeas corpus, conditioned on the State failing to grant a new trial within 60 days. Hinman was convicted in California of first degree murder and of assault with a deadly weapon. The conviction was affirmed by a California Court of Appeal and the Supreme Court of California denied a hearing. His attempts to obtain relief by way of a writ of habeas corpus in the State courts were unsuccessful and he filed this application for the writ in the district court.

The matter was referred to a United States magistrate who presided at an evidentiary hearing and, by a report dated January 30, 1978, recommended that the writ be granted. The record contains nothing to indicate that the report was served on the State at that time. By order filed July 19, 1978, the district court adopted his recommendation, reciting:

> "The Court has reviewed the petition, the return, the records submitted therewith, the traverse, and the attached Report and Recommendation, and concurs with and adopts the findings and conclusions of the United States Magistrate."

Filed simultaneously with this order were the judgment and Magistrate's report. The judgment was entered on July 20, 1978 -- one day later.

The Magistrate's Act, as amended in 1977, permits a judge to designate a magistrate to conduct evidentiary hearings in habeas corpus matters brought by State prisoners. 28 U.S.C. §636(b)(1)(B). Subsection (C) provides that, "the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties." This language is followed by:

> "Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A Judge

> of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommedations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

These provisions clearly were not observed. The magistrate's report was filed only one day before entry of judgment, therefore precluding the filing of any objections that the State might have wished to make and thus also precluding any de novo determination by the district judge of the proposed findings or recommendations to which the State might have objected.

We are not disposed to speculate, as Hinman would have us do, that the State would not have made objections even if the opportunity have been afforded. The statute sets very clear limits on the scope of the magistrate's participation in habeas corpus proceedings. Those limits have been

exceeded here.

We remand to the district court to provide the State the opportunities guaranteed it by Section 636. In view of the remand, we will not address the other issues raised by the State. If another appeal is taken, those issued may then be raised anew.

Reversed and remanded for proceedings consistent herewith.